82-1197

MISCELLANEOUS NO.————

IN THE

SUPREME COURT OF THE UNITED STATES

———— TERM 1982

ROBERT WAYNE WILLIAMS
a/k/a WILLIE WILLIAMS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BUSALD, FUNK, ZEVELY, BERGER
& KATHMAN, PSC

BY: .....

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The parties to this proceeding are those contained in the caption of the case in this Court, namely:

ROBERT WAYNE WILLIAMS
a/k/a Willie Williams ..... PETITIONER

UNITED STATES OF AMERICA RESPONDENT

The questions presented for review are:

WHETHER A STATE STATUTORY DEFENSE CAN BE RAISED TO A FEDERAL CRIME WHERE THERE IS NO CONFLICT IN THE STATE AND FEDERAL LAWS.

WHETHER THE COURT OF APPEALS ERRED IN ALLOWING APPEARINGLY NON-INCRIMINATING MATTER INTO EVIDENCE WHEN IT DID NOT AT THE TIME OF THE SEARCH INCRIMINATE THE ACCUSED.

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MAY IT PLEASE THE COURT:

Comes now Robert Wayne Williams, a/k/a Willie Williams, pursuant to Part V of the Rules of the Supreme Court and petitions the Supreme Court for a writ of Certiorari to the United States Court of Appeals for Sixth Circuit, to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 4, 1983. Petition for rehearing in this matter before the United States Court of Appeals was denied on November 24, 1982, and in support hereof, Petitioner states as follows:

The Opinion delivered in the Court below, that is, the United States Court of Appeals for the Sixth Circuit, affirmed Petitioners' conviction by per curiam, Opinion Number 82-5157 which has not yet been reported.

The United States Court of Appeals affirmed the conviction on November 4, 1982, by Judgment and Order Number 82-5157. A copy of the Opinion of the Court of Appeals, consisting of one page, is appended hereto. A Petition for Rehearing was filed on November 15, 1982, and said Petition was denied on November 24, 1982. No requests or orders concerning the granting of an extension for time in which to file the petition for certiorari have been made. The Supreme Court has jurisdiction to grant certiorari in this case. The Judgment sought to be reviewed was filed on November 4, 1982. The statutory provision believed to confer jurisdiction on thit Court to review the judgment or decree in question by writ of certiorari is 28 USC § 1254 (1).

The following statutes are involved in this case: 18 USC § 922 (H) (I) which provides:

> It shall be unlawful for any person (1) who is under indictment for a crime punishable by imprisonment for a term exceeding one year . . . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

KRS 503.030 (1) which provides:

> Unless inconsistent with the ensuing sections of this code defining justifiable use of physical force or with some other provisions of law, conduct which would otherwise constitute an offense is justifiable when the defendant believes it necessary to avoid an imminent public or private injury greater than the injury which is sought to be prevented by the statute defining the offense charged. . . . .

The following is a statement of the case containing facts material to consideration to the question presented:

On January 18, 1982, Petitioner, Robert Wayne Williams, was indicted by a Federal Grand Jury of the United States District Court for the Eastern District of Kentucky, charging the Petitioner with two counts of receiving a firearm which had been shipped and transported in interstate commerce, while under indictment in United States District Court for the Eastern District of Kentucky in violation of Title 18, United States Code § 922 (H) (1).

On January 6, 1982, at 1:30 A.M. Officer Hal Spaw of the Northern Kentucky Narcotics Unit executed a search warrant for the residence of Robert Wayne Williams at 6367 Taylor Mill Road. Officer Michael Steffen, also of the Northern Kentucky Narcotics Unit, was present during the search of the residence. In the search of the house, no illegal drugs were found, however, seven (7) firearms were on the premises. Only two of the guns were listed in the indictment.

At the time of the search, Officer Spaw inquired as to why there were so many weapons in the house. Mr. Williams advised the Officer that he had received many threatening phone calls. In fact, Officer Spaw left Mr. Williams a 12-gauge shotgun in case he did encounter any trouble. At this time, Officer Steffen inquired if Mr. Williams was a convicted felon, and where the guns came from. Mr. Williams replied that he was not a convicted felon and that he bought the guns from Jerry Gallichio of 147 Ward Avenue.

The Petitioner, Robert Wayne Williams, was tried before the Honorable Judge William O. Bertelsman, in the Eastern District of Kentucky, Covington Division, on March 15, 1982. The Honorable Judge William O.

Bertelsman returned a verdict of guilty as charged against the Defendant, Robert Wayne Williams, on March 15, 1982.

On March 16, 1982, Defendant, Robert Wayne Williams, was sentenced by the Honorable William O. Bertelsman to one term of imprisonment for five (5) years on each count to run concurrently.

This is not a review of the Judgment of a State Court so subdivision (h) of Rule 21 of the Rules of the Supreme Court is inapplicable.

The basis for federal jurisdiction in the District Court was 18 USC § 922 (H) (1).

Following is a statement of the reasons a writ of certiorari should be issued in this case.

1. In this case, the Court of Appeals in the Sixth Circuit found that not only did 18 U.S.C. § 922 (H) (2) pre-empt KRS 503.030 (1), but that no such defense could be raised. The Supreme Court has held in numerous occasions that federal law only pre-empts state law when states are prohibited from acting in a particular area. See *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977), and *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978). In *Maryland* v. *Louisiana*, 101 S. Ct. 2114 (1981), the Court held that "a state statute can only be void to the extent that it conflicts with a federal statute, for example, compliance with both federal and state regulations is a physical impossibility." The Petitioner contends, the relevant statutes here do not conflict. The intent of the Kentucky legislature in embodying a "choice of evils" defense in KRS 503.030 (1), was not to negate criminal statutes, but only to relieve criminal liability where a non-violation of the statute would create a greater evil factually, than

violation of the statute. There can be no question that the Petitioner was facing extreme physical danger from J. C. Adams, so much so that he had no choice but to arm himself to protect himself and his family. This issue, however, was not determined. The lower courts found that the Kentucky statute was of no force.

The Federal Courts have acknowledged a choice of evil defense, however, these Courts in general have avoided the issue of applying the defense by finding that the facts of the cases do not justify the defenses. The Court of Appeals, in *United States* v. *Hammons,* 566 F.2d 1301 (C.A. 5th Cir., 1978), stated that the "defendant was entitled to have instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." *Hammons, supra,* p. 1302. In *Hammons,* the defendant, in defense of a friend, persuaded one Mr. Bridges who was holding a gun on his friend, to surrender the gun to the defendant. After the trouble was over, the defendant retained control of the gun for a short period of time and was arrested. The Court of Appeals here avoided the issue of a "choice of evils" defense by stating as follows:

We need not decide whether some set of facts may sometime be held to present such a defense . . . we only hold that the facts of this case do not demonstrate a legal defense to the charge." *Hammons,* supra, at 1303.

In *United States* v. *Scales,* 599 F.2d 78 (C.A. 5th Cir., 1979), the Court rendered a similar evasive opinion. Again, instead of stating whether the defenses exist. In this case, the defendant had a gun drawn on him in a poolroom. He went outside, retrieved a gun from his car and shot the man holding the other gun. The Court

found that "in this context, self-defense was illusory." *Scales,* supra, at 80. Again, the Court did not deny any possible use of such defenses, but only found that the defenses could not be raised with these particular facts. In support of those cases, also see *United States* v. *Turnmire,* 574 F.2d 1156 (C.A. 4th Cir., 1978) and *United States* v. *Barham,* 595 F.2d 231 (5th Cir., 1979).

These Courts have acknowledged the existence of the choice of evil and self defense type defenses in cases of this type, but have been avoiding the issue by finding that the facts of the particular cases do not justify the defense. On the contrary, the Court of Appeals for the 6th Circuit found the Kentucky statute, or the common law defense, inapplicable, not available in any set of facts.

If a "choice of evils" can ever be applied the facts here mandate its use. Here we have a man who has and is suffering numerous, unequivocable threats upon his life, made by J. C. Adams and other members of his family. These threats were not only transmitted to Mr. Williams, but also to Debbie Roller, Donna Adams, Mr. and Mrs. Harry Williams and Carol Dodd, as shown by the Affidavits filed in the United States District Court for the Eastern District of Kentucky on March 22, 1982. It is clear that the Petitioner violated 18 USC § 922 (H) (1), but it is equally apparent that he was left with no other choice, as is apparent that without the guns he would have certainly met an early demise.

In conclusion, the defense asserted by the Petitioner should have been allowed as it is a part of the substantive law of Kentucky which neither conflicts with nor contradicts the Federal statute, or Federal common law. The circuits are in conflict in recognizing this defense and the Supreme Court should decide the issue, pursuant to Rule 17.1 (a) of the Rules of the Supreme Court.

For the foregoing reasons, Robert Wayne Williams urges a Writ of Certiorari to issue to the Court of Appeals for the Sixth Circuit.

2. This issue which Petitioner desires to raise concerns the interpretation of *Aquilar* v. *Texas,* 378 U.S. 408 (1964) and the cases that followed as well as *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971) and the case that followed. *Aquilar* v. *Texas, supra,* and *Spinelli* v. *United States,* 393 U.S. 410 (1969), require that when law enforcement agencies use informant's tips as a basis for a search warant the application must set forth underlying circumstances to enable the magistrate to independently judge the validity of the informant's conclusion and that the affiant must establish that the informant was credible or reliable. The United States failed to do this. The Supreme Court in *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971) ruled that an essential element of the plain view rule is that evidence inadvertantly discovered cannot be seized unless it incriminates the accused. In *United States* v. *Gray,* 484 F.2d 352 (6th Cir. 1973), the Sixth Circuit rejected the United States attempt to rely on the plain view doctrine where two apparently innocent rifles were seized and their serial numbers recorded by the police, who were executing a warrant for the presence of liquor. The Court found that the rifles were obviously not receptacles of the contraband sought, and were not incriminating evidence at the time the trooper removed them. The Court held that such actions could not be sanctioned under the plain view doctrine. The facts in the *Gray* case, supra, are similar to the present case, in that the guns found in Mr. Williams house obviously would not have contained the contraband sought and there was nothing incriminating about them. The agent knew that Mr. Williams was under federal indictment at

the time of the search and seizure, however, the officers apparently did not visualize that possession of the weapons constituted any illegal act. The position taken by the Court in *Gray* has been supported on numerous occasions. In *United States* v. *Clark,* 531 F.2d 928 (C.A. 8th Cir., 1976), the Court stated as follows:

> In order to qualify for the plain view exception, it must be shown (1) that the initial intrusion which afforded the authorities the plain view was lawful; (2) that the discovery of the evidence was inadvertant; and (3) that the incriminating nature of the evidence was immediately apparent. *United States* v. *Clark,* supra, at p. 932.

In accordance with the above cases also see *United States* v. *Shire,* 586 F.2d 15 (7th Cir., 1978); *United States* v. *Johnson,* 541 F.2d 1311 (8th Cir., 1976); *United States* v. *Canestri,* 518 F.2d 269 (C.A. 2d Cir., 1975); *United States* v. *Wilson,* 524 F.2d 595 (8th Cir., 1975); and *United States* v. *Williams,* 523 F.2d 64 (8th Cir., 1975).

The admission of the guns in to evidence was a gross violation of Mr. Williams' right to due process of law. The entry was based on a defective warrant. There were insufficient statements in the affidavit to support a finding of probable cause. The weapons found were not known to be a violation of any law, as pertains to Mr. Williams. One weapon was left. Serial numbers were written for the purpose to determine if the weapons had been stolen.

For the foregoing reasons, the Appellant respectfully urges that this petition be granted.

Respectfully Submitted,

BUSALD, FUNK, ZEVELY, BERGER
& KATHMAN, PSC

BY: .....

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IN THE
SUPREME COURT OF THE UNITED STATES

———— TERM 1982

MISCELLANEOUS NO. ————

ROBERT WAYNE WILLIAMS,
a/k/a WILLIE WILLIAMS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

I hereby certify that on this the 11 day of January, 1983, copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit were mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; United States Attorney for the Eastern District of Kentucky; and Mr. John P. Hehman, Clerk, United States Court of Appeals, Cincinnati, Ohio 45202. I further certify that all parties required to be served have been served.

BUSALD, FUNK, ZEVELY, BERGER & KATHMAN, PSC

BY: .....

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226 Main Street
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(606) 371-3600

APPENDIX

NO. 82-5157

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs

ROBERT W. WILLIAMS,
a/k/a WILLIE WILLIAMS,
Defendant-Appellant.

ORDER

Before: EDWARDS, Chief Judge, MERRITT, Circuit Judge, VAN PELT, Senior District Judge.*

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof

The Court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and

It is therefore ORDERED that said judgment be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT.
John P. Hehman, Clerk

ISSUED AS MANDATE: _____
COSTS: _____

* The Honorable Robert VanPelt, Senior District Court Judge for the District of Nebraska, sitting by designation.

NO. 82-5157

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ROBERT W. WILLIAMS,
a/k/a WILLIE WILLIAMS,
Defendant-Appellant.

ORDER

Before: EDWARDS, Chief Judge, MERRITT, Circuit Judge, VAN PELT, Senior District Judge.*

On receipt and consideration of the Petitioner for rehearing in the above-styled case; and

Noting appellant's argument,

Said motion is hereby denied for the reasons set forth in the oral opinion dictated from the bench, plus U.S. Constitution, Article VI, § 2.

Entered by order of the Court
CLERK

SEARCH WARRANT

THE COMMONWEALTH OF KENTUCKY

TO ANY POLICEMAN, SHERIFF, CONSTABLE, OR OTHER PEACE OFFICER OF THE COMMONWEALTH OF KENTUCKY:

Application, by affidavit, for a Search Warrant having been made this date, and it appearing that probable cause has been stated by the affiant, David Patchell, N.K.N.E.V., you are therefore commanded to search 6367 Taylor Mill, Independence, Kenton County, Kentucky, more particularly described as Single Family residence (Brown Shingle – 2 Story) situated on a large lot which is referred to by Willie Williams a resident on the farm for the following property Methaqualone – Large Quantity, A Controlled Substance under K.R.S. Chapter 218A. and to safely hold any thereof you may find until further order of a Court of Competent Jurisdiction, said property constituting evidence of an offense against the peace and dignity of the COMMONWEALTH OF KENTUCKY.

Witness my hand this 6 day of January, 1982.

/s/ DOUGLAS M. STEPHENS
JUDGE, Kenton District Court
First Division

Executed this warrant
this 6th day of
January, 1981, at 1:35 A.M.

COMMONWEALTH OF KENTUCKY
COUNTY OF KENTON

APPLICATION AND AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT

Comes the Affiant, and states that the information contained herein was received and made in his capacity as a Peace Officer. Affiant's name is David Patchell, N.K.N.E.U. and Affiant believes there is (on or in the premises numbered) 6367 Taylor Mill, Independence, Kenton Co., Ky. more particularly described as Single Family residence (Brown Shingle – 2 story) situated on a large lot which is referred to by Willie Williams, a resident, as the "farm". the following property Methaqualone – Large Quantity A controlled substance under KRS Chapter 218A. Which property affiant believes to be: (things used as the means of committing a crime) (things in the possession of a person who has intention to use as means of committing a crime or in the possession of another to whom any person may have delivered it for purpose of concealing it or preventing its being discovered) (things which consist of evidence which tends to show that a crime has been committed or that a particular person has committed a crime) (contraband).

Affiant further states that on the date and at the time of 1/5/82 10:00 p.m. affiant received information from a Confidential Informant (CI) who stated to Affiant that within twelve (12) hours of 1/5/82, 10:00 p.m. CI was in the aforesaid premises. At said time and place CI had a conversation with Teddy Williams who CI believes to be a relative of Willie Williams, a resident of said premises. Said Teddy Williams showed CI several large bags of white tablets whicch Teddy Williams represented to be qualudes the street name for methaqualone, a Schedule II

non narcotic under KRS Chapter 218A. CI who due to CI's involvement with the drug culture believes the same to be Methaqualone tablets.

Acting on the information received, affiant conducted the following independent investigation:

Affiant believes his informant to be reliable and truthful because within the past three (3) months, CI has given to Affiant information as to the whereabouts of controlled substances under KRS Chapter 218A on three (3) occasions. On each such occasion Affiant found controlled substances where CI has so indicated.

/s/ DAVID L. PATCHELL
AFFIANT

Subscribed and sworn to before me this 6 day of January, 1982, at 12:30 a.m.

/s/ DOUGLAS M. STEPHENS
JUDGE, Kenton District Court